

STATEMENT OF
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VETERANS OF FOREIGN WARS OF THE UNITED STATES
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
WITH RESPECT TO

“Veterans Appeals Improvement and Modernization Act of 2017”

WASHINGTON, D.C.

May 2, 2017

Chairman Roe, Ranking Member Walz, and distinguished members of the Committee, on behalf of the men and women of the Veterans of Foreign Wars of the United States (VFW) and its Auxiliary, thank you for the opportunity to present the VFW's thoughts on the pending *Veterans Appeals Improvement and Modernization Act of 2017*. The VFW is the nation's largest war veterans organizations, with more than 1,900 accredited representatives around the world, representing nearly 500,000 veterans in prosecuting their benefit claims before the Department of Veterans Affairs (VA). As such, this proposed legislation will have a tremendous impact not only on the members of the VFW, but on all the men and women we serve every day out of VA Regional Offices, military installations, as well as state and county offices.

First, I must clarify that the VFW supports the Committee's effort to reform and modernize the VA claims and appeals process to better serve the needs of the veterans' community. Over the years, the VA claims and appeals process has morphed into a bureaucratic leviathan that the average veteran cannot possibly understand. Moreover, for veterans who disagree with their assigned rating decision, they currently have no way to determine whether choosing to appeal is a reasonable course of action without seeking assistance from an accredited representative or legal counsel. Then, should a veteran choose to appeal their decision, exercising their due process rights can take up to five years. To the VFW, this does not seem like a veteran-centric, non-adversarial process.

To the VFW, the goal of the *Veterans Appeals Improvement and Modernization Act of 2017* is to once again build a veteran-centric process that is easy to navigate and protects a veteran's rights every step of the way. Last year, the VFW was one of more than a dozen veterans' community stakeholders convened to discuss the way forward in modernizing the VA claims and appeals processes. At the time, the acknowledgement was that the system was cumbersome and no longer satisfied the needs of veterans who rightfully expect timely and accurate rating decisions on the benefits they earned. The resultant product of these discussions is the framework included in this draft legislation, and the VFW is proud to support it. However, we have several questions

and recommendations for this Committee to consider before advancing this legislation to ensure that any new claims and appeals framework satisfies the intent of Congress to build a veteran-centric system. In our testimony today, we will discuss the VFW's perspective on the new claims and appeals framework — preserving clear and unmistakable error protections; options to adjudicate legacy appeals; and VA reporting requirements.

New Claims and Appeals Framework

Through this legislation, Congress will modify the options for veterans to pursue accurate rating decisions prior to filing a formal appeal, while simultaneously preserving their earliest possible effective date. This legislation also directs VA to improve its award notifications for veterans, outlining seven specific pieces of information each decision notice to a veteran shall include. Improved notification letters have been a top priority of the VFW and our partner organizations for years, and we are happy to see the Committee pursue this aggressively. To the VFW, inadequate notification letters have been a fundamental failure in the VA claims process for decades. In their current format, veterans have no reasonable way to understand how VA arrived at their benefit decision, meaning veterans have no way to reasonably conclude whether or not the decision is accurate and whether or not they need to pursue another avenue of recourse.

As accredited representatives, one of our top responsibilities is explaining rating decisions to veterans and deciphering which evidence was used to render a decision and how VA evaluated that evidence. Improved decision notices will put some of this power back into the veteran's hands, ensuring they are well informed of their rating and how VA arrived at its conclusion. This sets the veteran up for success in navigating the process and has the potential to cut down on appeals where veterans simply may have misunderstood their rating decision.

Coupled with improved notifications, this legislation codifies three specific paths through which veterans can arrive at a fair and understandable rating decision, while preserving the earliest possible effective date. Two of these paths — higher level review and supplemental claims readjudication — offer recourse for the veteran without filing a formal appeal, offering the veteran and VA the opportunity to rectify discrepancies before the veteran formalizes an appeal.

Currently, when a veteran receives a rating decision, they must choose whether or not to formally file a notice of disagreement, kicking off a potentially years-long process to arrive at a new decision, sometimes when only small matters of evidence or interpretation of the law need to be addressed. By redesigning appeal options, the process remains non-adversarial as long as possible, and also encourages VA to produce quality rating decisions at the local level, instead of punting more complicated cases for the Board of Veterans Appeals (BVA) to review.

Critics have called these two new paths at the regional office an “erosion” of veterans' due process rights. This is an inaccurate assessment that fails to acknowledge that the VA claims process is supposed to be veteran friendly and easily navigable by any veteran who seeks to access his or her earned benefits. Moreover, the new framework actually expands veterans' due process rights by offering additional recourse at the local level, preserving routes to the BVA and the courts, and preserving a veteran's right to seek legal counsel after an initial rating decision.

Though the VFW always encourages veterans to seek professional assistance from an accredited representative whenever possible, a perfect system would be one where veterans do not need professional assistance, and certainly do not need to retain a lawyer, simply to claim an earned benefit. The VFW believes this proposed framework — if properly implemented — moves veterans more closely to such a system.

To the VFW, the most critical new protection for veterans is the lane in which veterans can continually submit new and relevant evidence to VA within one year of a rating decision and receive a new rating decision on the evidence of record, preserving their original effective date. Coupled with improved notification letters, this option could be a game changer for veterans, resulting in more favorable decisions at the local level.

First, lowering the evidentiary threshold to receive a new rating decision to only new and relevant is an improvement for veterans. The old standard was new and material. While the VFW would prefer that VA only be required to consider new evidence, we support this change which would ease the evidentiary burden for veteran claimants, potentially resulting in more favorable decisions.

Key to the success of this lane is communication among VA, the veteran, and the veteran's advocate where applicable. If a veteran receives a clear and understandable rating decision, but notices that certain evidence was not contained in the record, they now have an opportunity to formally submit this and receive a new, timely rating decision, instead of pursuing years of a formal, contentious appeal. Moreover, accredited veterans' advocates now have a new tool to help resolve claims at the earliest possible time, ensuring that their clients receive every benefit they have earned.

To the VFW, this is the best possible outcome. According to VA's own data, more veterans are seeking out our assistance every year to access their earned benefits. Last year, the VFW took on four new claimants for every claimant we lost. While we like to tout that this is a testament to the professionalism of our staff, we also know that this kind of growth means that we need to help VA get it right the first time. Prolonging a veteran's claim is bad all around. It puts unnecessary stress on the veteran and it makes VA look like an irresponsible steward of benefits. At a time when more veterans need access to benefits, the VFW supports offering more non-adversarial recourse at the local level to arrive at quality rating decisions. This is what our veteran clients expect, and this is why we support this new framework.

The VFW also supports the maintenance of two separate dockets at BVA to adjudicate new appeals, though we have persistent concerns about the timeliness of decisions in each docket and the potential disincentive for veterans to pursue an appeal with a hearing. That being said, the VFW supports docket flexibility so that BVA can properly manage its workload and provide veterans with timely decisions. However, in testimony earlier this year, VFW Commander-in-Chief Brian Duffy called for the simultaneous maintenance of five separate dockets at BVA to best reflect the legacy workload as well as the new system workload, including one docket for appeals with no new evidence and no hearing; one for appeals with new evidence but no hearing; and one for appeals with both new evidence and a hearing.

Next, in past discussions, some were concerned that a new framework would erode veterans' due process rights and have a chilling effect on the Court of Appeals for Veterans Claims. The VFW is happy to see that the Committee worked to address this concern in this legislation, articulating that effective dates of supplemental claims resulting from court decisions will be offered the same protections within one year of the court's decision. The VFW believes that this is sufficient to retain oversight of BVA decisions and assuage concerns that veterans would be penalized for pursuing their claims through the court system only to lose their effective date.

When the Committee first started discussing the concept of appeals reform for the 115th Congress, the VFW and several of our partner Veterans Service Organizations (VSOs) saw this as an opportunity to once again discuss potential conflicts that arose in the initial discussions in 2016. One significant conflict was the ability of veterans with appeals languishing in the legacy system to be able to opt into the new framework. In this legislation, we are pleased to see that the Committee addressed these concerns by articulating formal "off ramps" for legacy appeals to opt into the new system at critical decision points.

To the VFW, this is a benefit to affected veterans and to VA. First, veterans whose appeals have been mired in the old appeals system will have several opportunities to take advantage of new processes, such as submitting new and relevant evidence when their claims are remanded back to the Regional Office. This will allow veterans an opportunity to avoid another lengthy appeal process and allow VA to address the issues at the Regional Office in a timely manner. For VA, the VFW believes this will be a critical tool in helping to adjudicate the backlog of legacy appeals, resulting in more timely, favorable decisions for veterans.

The VFW understands that VA had some concerns about these off ramps and the strain on resources at the local level. The VFW does not share these concerns as VA has the responsibility to adjudicate its workload regardless of where the claim happens to be in the process. Moreover, this reinforces the VFW's calls on Congress to properly resource Veterans Benefits Administration (VBA) and BVA to manage their workload. Without proper resources, any claims and appeals framework will fall prey to dangerous backlogs, resulting in unacceptable benefit delays for veterans.

Preserving Clear and Unmistakable Error Protections

As with any systemic change, the VFW seeks to avoid unintended consequences. One of the most critical protections offered to veterans in the current claims and appeals framework is the ability to revise rating decisions in which VA has made a clear and unmistakable error (CUE) in its rating decision. While many times veterans must take a remedial claim action within a year of their rating decision to preserve an original effective date, decisions based on CUE can be revised back to the original effective date at any time.

In revisions to the discussion draft, section 5104(c) was added to allow veterans with decisions issued in the one year period prior to the effective date of the modernized appeal system to opt into the system. This revision adds a section that creates a conflict of law, and we would like to address this now in the statutory language so there is no need for litigation. After the one year period to submit additional evidence or appeal a decision has passed, the decision becomes final

and can only be revised in two ways: by submitting new and material evidence (new and relevant under the modernized appeals system); or by submitting a motion to revise a previous decision based on clear and unmistakable error. A motion to revise a previous decision based on clear and unmistakable error (CUE) is not a claim. It has its own authority under section 5109A of title 38 United States Code (USC) for motions filed with respect to a final decision by the agency of original jurisdiction and under section 7111 of title 38 USC for motions filed with respect to a final decision by the Board of Veterans Appeals.

The authority to revise a decision based on CUE is an important vehicle for redressing wrongs in the event that a veteran failed to prosecute his or her claim and the underlying decision was incorrect based on the law at the time of the decision. If a claimant is ill or unable to file a notice of disagreement within a year, the effective date of the claim is lost. In the event that the decision was so off base as to constitute clear and unmistakable error, it is against the interest of justice to disallow a revision of that decision, back to the date that it should have been granted. Because section 5104(c) of title 38 USC states that the only way to revise a final decision is to file a supplemental claim under section 5108 of title 38 USC or *regulations* pursuant to this section, it vitiates the authority of section 5109A of title 38 USC and section 7111 of title 38 USC.

The VFW must have assurance from the Committee that nothing in these sections precludes a veteran from filing a request to revise a final rating decision containing a CUE, or filing a notice of disagreement or request for higher level review on such a request. Without this critical due process protection for veterans, the VFW believes that the entire framework for appeals reform fails.

Legacy Appeals

Since the first discussions on appeals reform with VA, the VFW has been very clear that any changes to the system must be coupled with aggressive initiatives to adjudicate legacy appeals in a timely manner through both legislative authority and proper resourcing. The VFW had asked for off ramps to allow veterans with legacy appeals to opt into the new process, and we thank the Committee for including these off-ramps in this legislation.

In the 114th Congress, the VFW also supported an initiative to create a fully developed appeals process for veterans in the legacy system. Through fully developed appeals, veterans and their accredited advocates would have an opportunity to submit all relevant evidence and a statement of the argument at the time in which they file a notice of disagreement. The Committee included this in the legislation as a potential option for the Secretary of Veterans Affairs to exercise in helping to more quickly adjudicate legacy appeals.

The VFW supports the intent of this position, but we question its value as written pertaining to legacy appeals already included in the appeals backlog. In its current form, it seems that a potential fully developed appeals process would only appeal to new appellants after enactment. This would likely only serve as a stop-gap for any appellants who file within the first six months of enactment of the legislation. The VFW would recommend amending the election criteria to

allow for veterans with legacy appeals to elect into a proposed fully developed appeals process at any point after enactment.

Finally, the VFW must stress the importance of properly resourcing BVA and VBA to adjudicate the legacy appeals backlog and the potential influx of supplemental claims and higher level review requests at the VA Regional Office. My predecessor in VFW National Veterans Service, Jerry Manar, used to say that VA liked to play Whack-a-Mole with its pending workload. When initial claims were backlogged, they concentrated resources on initial claims. This has since set off a chain reaction that has resulted in a backlog of appeals and other claim actions at the Regional Office level. Every time there is a crisis, VA has the habit of reallocating its resources to address the latest crisis. This only leads to other crises. VA must be properly resourced to manage its workload if we expect this new framework to succeed.

Planning and Reporting Requirements

The VFW supports the inclusion of a 90-day report to Congress on VA's plans to address legacy appeals, implement its new system, and process claims in the new system in a timely manner. While this planning report may seem extensive, the VFW is very interested in the feedback that VA can provide on its plans to ensure that the new framework is designed to succeed.

One of the most critical points that the VFW supports in the planning proposal is the requirement for VA to report on required resourcing and staffing levels to accomplish its new mission. The VFW is also interested in VA's estimates on total work load, processing times, and its communication plan to properly inform veterans of changes and criteria to take advantage of new options. The VFW also supports semiannual reports on implementation.

The VFW understands the need for extensive reporting requirements and we agree with the Committee on many of the data points included in the legislation. However, we question the practicality of insisting that VA report on all 22 data points on a monthly basis. The VFW instead recommends that the Committee articulate the timeline on which VA would need to periodically report each data point. For example, the VFW believes that the data points included in Section 5, A through G are standard data points that VA should already be tracking and should be able to report out on a monthly basis.

Next, data points H through K and U deal with supplemental actions on remanded decisions. Understanding the VA workflow, this may not be practical to report on a monthly basis, but instead on a quarterly basis to better analyze data and identify trends.

Finally, data points L through V (omitting U) seem to be long term metrics that would be impractical to track on a monthly basis and would likely only be useful in identifying annual or semi-annual trends. For example, data point M is likely only to yield data once a significant number of veterans have submitted new and relevant evidence in supplemental claims to preserve their effective date over a span of several years.

The VFW was also happy to see that the Committee is asking for extensive reporting from VA on legacy appeals. The VFW supports many of these data points, and has had similar questions

about the appeals process over the years — particularly the disaggregated time that VA waits for a claimant to take action and the time a claimant waits for VA to take action. We believe that this report will help to better understand the pitfalls that led to the appeals backlog and help avoid them in the new framework.

A modernized appeals system must be responsive to future needs of veterans. Veterans benefits date from the beginning of the United States, and our citizens and government have stepped up to care for veterans as the nature of war and society has changed. Judicial review of veterans benefits decisions has been in place for almost thirty years, and a decision this past week by the Federal Circuit in *Monk v Shulkin* recognized that veterans have a right to aggregate their appeals into class actions. While this decision does not directly affect the modernized appeals framework, it will also help to eliminate the "hamster wheel" appeals process, and will affect regulations handling new procedural directives from the Courts. Congress must maintain close oversight over the timely handling of appeals for veterans who have been waiting the longest. At the same time, the modernized appeals system also needs the oversight of Congress to continually improve the process. We believe the changes proposed in the legislation being considered today would go a long way in forming a more veteran centric process. But appeals do not exist in a vacuum, and the feedback we receive must drive improvements to the processes used by VA and stakeholders to obtain fair accurate decisions at the earliest point possible, and improve the quality of life for veterans and their families.

The VFW is encouraged by the legislation you are considering today and strongly supports efforts to reform the claims and appeals system to build a more veteran-centric appeals process. For years, we have been stuck in the same place, afraid to take action out of fear we will make the wrong decision. The problem is that if we stay put, the situation will never improve. That is unacceptable for the veterans who deserve timely access to their earned benefits. The VFW believes it is time to improve this process. We encourage the Committee to include the VFW's recommendations when marking up this legislation, and we look forward to continuing to work with the Committee to advance these critical reforms.

Mr. Chairman, this concludes my testimony. I will be happy to answer any questions you or the Committee members may have.

Information Required by Rule XI2(g)(4) of the House of Representatives

Pursuant to Rule XI2(g)(4) of the House of Representatives, the VFW has not received any federal grants in Fiscal Year 2017, nor has it received any federal grants in the two previous Fiscal Years.

The VFW has not received payments or contracts from any foreign governments in the current year or preceding two calendar years.